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No. 99-1475

IN THE

Supreme Court of the United States

PAMELA STONIER, et al.,
Petitioners,

v.

DIGITAL EQUIPMENT CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondent's Brief in Opposition ("Opp.") attempts to change the way this case comes to this Court by focusing the Court on a task that Petitioners' have not requested – "entangling itself in --- fact-specific issues which are of no importance beyond this matter." [Opp. at p. 11 ¶ 1]. Petitioners have appropriately brought this case to the highest court under Supreme Court Rule 10(a) that states in pertinent part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Petitioners raise important public interest issues by requesting this Court to determine if 1) federal courts are exceeding intended precedent for deciding Rule 56 motions as set by this Court in the "trilogy" cases *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and 2) if in so-doing are the federal courts threatening to obviate Seventh Amendment rights?

CORRECTION OF FACTS

By its counter statements Respondent well establishes that genuine issues of material fact are in dispute between the parties. Petitioners address

Respondent's misstatements in its Opp. at sections 1-4, pp. 2-7.

1. *Ms. Stonier's termination from Digital.*

Ms. Stonier was not terminated "as part of an involuntary reduction in force that affected a number of Digital employees." This was not business-as-usual. Ms. Stonier was singled out for termination from Mr. Smart's organization solely in response to his pretextual statements to his management that she had been scheduled for layoff in a prior organization, when that was not true, and that the target funding source for her new business plan had no funds available nor interest, when that was untrue. Internal Digital memo illustrates that Mr. Smart was searching for an organization within Digital to which he could transfer her for the purpose of engineering her layoff when his need for her information had been satisfied. [J.A. at 453 – memo from Ron Smart's Personnel consultant Dave Person concerning transfer of Stonier for the sole purpose of transitioning her out of Digital].

2. *Ms. Stonier's Formation of Thinkworks and Omnimensions.*

Petitioner fails to see relevance to the Petition for Certiorari in these facts. However, since Respondent fails to state the full facts in its implication that Ms. Stonier was voluntarily considering leaving Digital to set up her own business, it is necessary to point out that she never voluntarily *initiated* any wish to leave Digital to form her own company, and so represented that fact to the District and Appellate Courts [2nd Cir. CA Joint Appendix – hereafter "J.A." – at 50-51, 143-

146, 149-151; Petition ("Pet.") at p. 6]. Petitioner Stonier believes that if facts raised here by Respondent are relevant to her claims of fraud in connection with her discharge, they are fact issues appropriate for jury consideration, which further supports her position that this cause of action should be remanded for jury trial.

3. *The Thinkworks Contract.*

Respondent attempts to focus this Court on its disputed narrow view of contract terms and obligations. This reinforces Petitioners position that the parties are genuinely in dispute concerning the facts, intent and frame of mind concerning the purpose, scope of contract rights and obligations, and terms of consideration, and that therefore Thinkworks and its third-party co-developers should be given the opportunity to testify and cross-examine Digital concerning these disputed issues at a jury trial. [Pet. at pp. 13-25].

Petitioners comment on Respondent's assertion that the reason Digital "never prepared any revenue sharing agreement" was because "Digital did not accept Modules 2 and 3" [Opp. at p. 6-7]. Petitioners contend that the fact that Digital did not initially accept Thinkwork's work under Modules 2 and 3 had nothing to do under the terms of the contract with Digital's not completing its part of the Revenue Sharing Agreement. Respondent's statement to this effect further reinforces Petitioner's contention that the District and Appellate Courts did not look to all the phrases and circumstances in determining plain meaning, and that as such this case should appropriately be heard by a jury of reasonable minds to determine intent, or be

remanded for further examination by the District Court.

The fact that Digital did not complete the numbers in the revenue-sharing agreement is not a valid defense against Digital's being obligated to render consideration to Petitioners on the basis of revenue-sharing where the contract explicitly provided that the terms for consideration were "terms of revenue sharing to be determied by Digital and Thinkworks in a separate revenue sharing Agreement." *Texas Instruments Inc. v. U.S.*, 922 F.2d 810, 811, 814-815 (Fed. Cir. 1990) (... "the negotiation between TI and the Government of a price term was not an "alteration in the specification, delivery point, rate of delivery, contract period, price, quantity or other contract provisions of an existing contract," since the "existing contract" was not in conflict with a newly negotiated price and, moreover, expressly contemplated the later negotiation of the price;" the law has long been that "[I]t makes no difference that the contract was not formally signed ..." for the Government to be bound by the terms of a contract. Citing *United States v. Purcell Envelope Co.*, 249 U.S. 313, 319, 39 S.Ct. 300, 301-02, 63 L.Ed. 620 (1918). "[F]ormal execution, as we have seen, [is] not essential to the consummation of contract." *Id.*

4. *The Failure of the Seminar Series.*

Contrary to Respondent's allegations that Petitioner Thinkworks' FDICIA seminar series proved unsuccessful, internal Digital correspondence indicates

that the seminar series was admittedly, by Digital's Bob Rahill, a valuable success:[1]

> On Thursday 9/24, I attended the Digital sponsored "FDICIA: Safety, Soundness and Opportunities" seminar in San Francisco. This was the first in a series of FDICIA seminars to be delivered to financial institutions across the U.S. The purpose of this seminar was (1) to identify the major requirements and issues that financial institutions must address to comply with the Federal Deposit Insurance Corporation Improvement Act passed in December 1991, and (2) position Digital as a solution provider in such areas as management reporting, financial reporting, risk management, asset/liability management, and regulatory reporting.[2]
>
> ... From my standpoint, I found the seminar to be beneficial in that:
>
> - It provided me with a better foundation on FDICIA (as well as ALM, risk management) and its expected impacts. Helps to know what the

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[1] Digital's Pete Wysocan sent his Finance Manager, Bob Rahill to observe Thinkworks seminar delivered in San Francisco on September 24, 1991. Following Mr. Rahill's evaluation Digital first tried to independently start running seminars without Thinkworks, and then when Ms. Stonier objected, orally revised the Contract, requesting the Thinkworks' team to design two more seminars for the California region. [J.A. at 277 at pp. 275:23-276:22].

[2] Digital subsequently delivered a competitive Corporate Leaders Forum on this same topic in breach of Contract. [J.A. at 305-306 CLF Agenda; Pet. at pp. 13-15, 21-23].

> customer needs and problems are before you try to discuss and design solutions!
>
> The informal discussions with customers, Digital account team people, and seminar presentors provided valuable feedback and insight that in my opinion is greatly missing in our Management Reporting/Information Utility work.

[J.A. at p. – Bob Rahill seminar evaluation memo entitled "9/24 FDICIA seminar report"].

The concept of the seminar and launching a risk management consulting practice for the finance function of banks was such a success that Digital copied the program design and, unbeknown to Thinkworks until this litigation, ran a Corporate Leaders Forum ("CLF") seminar on this same subject matter. However, Digital excluded Petitioner Thinkworks' entire team from participating in this major marketing event that Digital was contractually obligated to undertake with Thinkworks. Digital thereby unfairly competed with Petitioner, which contributed to ruining Petitioner's relationships with its third party co-development partners and potential customers,[3] by blocking Petitioner and its partners from realizing any consideration flowing from the CLF for their work under the Thinkworks contract. [J.A. Stonier April 27, 1997 dep. at 246A-246H; *Id.* Rahill memo cited at p. 5 this Reply showing CLF subject matter at *Id.* fn. 2 this Reply and FDICIA seminar subject matter to be parallel; Pet. 15-18, 22-23].

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[3] J.A. at p. 70 at Stonier Interrogatory Answer at ¶ 57.

The Respondent makes a baldface assertion that Capital Funding released Digital "specifically [from] claims for payment arising out of work performed by Thinkworks." That language nowhere appears in the release. The District Court's decision granting summary judgment, which was affirmed by the 2nd Circuit, accepted that assertion without any evidentiary basis, and granted Respondent's motion for summary judgment, denying Petitioners their right to take Thinkworks' contractual matters to jury verdict. Both courts ignored Petitioner Thinkworks' briefs and supporting contractual evidence that brought the fact that that language nowhere appeared in the release. [Pet. at Appendix pp. A7; A17 – District Court Magistrate quoting unsupported attorney statement in Paper 116 ¶ 35, *Respondent's Statement of Undisputed Facts in Support of its Motion for Summary Judgment*; A26-27; A32; Pet. at pp. 19-21].

ARGUMENT

Respondent states that "there is no controversy concerning the appropriate summary judgment standards" applied by the Second Circuit, and that therefore a writ of certiorari is inappropriate. Petitioners correct that misstatement by referencing their statements in their Petition at pp. 12, 15-29.

The volume of distinguished writing on the topic of Circuit and District Court Rule 56 decision-making over the last 14 years indicates that the issues of appropriate vs. mis-application of well-established summary judgment standards since the 1986 trilogy of cases is widely debated, and worthy of review by this

Court at this time. [4] Petitioners' case offers numerous causes of action to serve as a broad reaching lens for such a review. The issues in this case raise concerns regarding usurpation of the role of the jury that are similar to Rule 50 and 56 matters referenced in two other cases that came before the Court this term, *Reeves v. Sanderson Plumbing* (U.S. Sup. Ct. Docket # 99-536) argued on March 22, 2000, and *Marshall Nero,*

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[4] Examples of distinguished writings concerning evolution of Rule 56 practice in federal courts since precedent set by this Court in the 1986 trilogy – *Anderson, Celotex, and Matsushita, supra* at p. 2: Carrington, Paul D., *The Federal Rulemaking Process – The Reporters Speak: Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. of Penn. L.R. 2067 (1989); Childress, Steven Alan, *A 1995 Primer on Standards of review in Federal Civil Appeals*, 161 F.R.D. 123 (1995); Friedenthal, Jack H., *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 Notre Dame L. Rev. 770 (1988); Gregory, Robert J., *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. L. Rev. 689 (1996); Issacharoff, Samuel & Loewenstein, George, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73 (1990); Landsman, Stephan, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579 (1993); Levine, Marcy J., *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 Emory L.J. 171 (1988); McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203 (1993); Wald, Patricia M., *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1898 (1998).

et al. v. Georgia Nursing Home (pending approval for out-of-time filing – 11th Cir.)

If this Court allows the trend of judicial usurpation of the role of the jury to go unchecked and to become the standard in Rule 56 proceedings, then our Seventh Amendment rights will have become subject to what amounts to judicial repeal. For that reason, among others stated in this Reply and the Petition, the public interest warrants this Court's review of this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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